IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN AND HELEN L. BUTTENWIESER,
Appellants,

AGAINST

JOHN W. GARDNER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES, AND HAROLD HOWE, 2D, AS COMMISSIONER OF EDUCATION OF THE UNITED STATES,
Appellees.

BRIEF OF COUNCIL OF CHIEF STATE SCHOOL OFFICERS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION AND THE HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., amici curiae.

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INDEX

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Federal Constitutional Provisions

Miscellaneous

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STATUTE INVOLVED

The statutory provisions involved in this suit are Titles I and II of the Elementary and Secondary Education Act of 1965.

THE QUESTION PRESENTED

Does the instant suit present a case or controversy, involving issues appropriate for judicial resolution, which appellants have standing to bring?

INTEREST OF THE AMICI CURIAE

Each of the *amici curiae* is an association or organization intimately concerned with the preservation, protection and promotion of public primary and secondary school education. Each of these *amici curiae* is deeply committed to the primacy of public education as the bedrock of our democratic order. These *amici* oppose direct government aid to religious, parochial schools, pursuant to the Elementary and Secondary Education Act of 1965, because such aid seriously jeopardizes the primacy of public education and breaches the First Amendment's wall of separation between church and state.

Council of Chief State School Officers

Established in 1928, the Council is an organization of state superintendents and commissioners of education, entirely independent of any other professional or official organization. Its membership includes the chief school officers of the fifty states and also the heads of the public education agencies in American Samoa, the Panama Canal Zone, Guam, Puerto Rico, the Trust Territory of the Pacific Islands and the Virgin Islands.

American Association of School Administrators

The American Association of School Administrators, first organized in 1865 as the National Association of School Superintendents, with an initial membership of 50 state and city superintendents, currently has a membership of 17,000. It is a professional organization which promotes development of competent administrative leadership for schools

and provides the means for this leadership to give unified expression to the goals and values in education.

The Association's current policy on the separation of church and state is:

> "The concept of separation of church and state, which postulates that the resources of the state shall not be used to support any religious group or persuasion, continues to be an imperative in the American form of government. This Association reaffirms its long-standing policy that public tax monies should not be expended for nonpublic educational institutions. On the basis of the increasing goodwill shown among the various faiths and between the public and nonpublic school systems, we further recommend that the services of the public schools be made available, within the public schools, to all children. The AASA recommends that all school administrators seek to strengthen common understandings in the interest of all the children attending schools in America."

National School Boards Association

The National School Boards Association is composed of State School Boards Associations in all the states. The State Associations in turn, are composed of all the local school boards within the respective states. As so federated, the Public School Boards of America believe that "education is the bulwark of freedom" and that our universal system of free public education is literally the nation's first line of defense and the greatest constructive force of the American people for the preservation of their freedoms and advancement of the democratic way of life. The NSBA has taken official positions expressing concern about the "serious uncertainties of utilizing public funds for non-public school purposes."

National Association of State Boards of Education

This Association is composed of the constitutional and statutory boards of education in the states which have general supervisory responsibility for education. These boards have powers and exercise responsibilities which vary greatly from state to state, but which include in every state general supervisory authority over the elementary and secondary public schools of the state.

The Horace Mann League of the United States of America

The Horace Mann League is a non-profit educational and charitable corporation organized and operated for the purpose of fostering and strengthening the American public school system. It was the moving force in the case of *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A. 2d 51 (1966), *cert. denied, app. dismissed*, 385 U.S. 97, in which the Maryland Court of Appeals voided, on Establishment Clause grounds, direct grants-in-aid from the State of Maryland to certain church-related institutions of higher education. The nationwide membership of the League includes a large number of college presidents and deans, chief state school officers, city and county school superintendents, and other educational authorities.

The platform of the League is reproduced in the margin.*

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* "The Horace Mann League exists to perpetuate the ideals of Horace Mann, the founder of the American public school system. Its basic purposes and activities are to strengthen our public schools. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a most necessary unifying and dynamic influence in American life. According to the League's beliefs, our public schools should be free, classless, nonsectarian, and open to all of the children of all of the people. The schools should be dominated by

STATEMENT OF THE CASE

This class action was brought by a group of individuals to challenge the constitutionality, under the First Amendment, of certain expenditures made by the United States Department of Health, Education and Welfare. Since the District Court granted a motion to dismiss, the allegations of the complaint must be taken as true for the purposes of this appeal.

The appellants are citizens and taxpayers of the United States, and residents of and qualified voters in the City and State of New York. Appellant Helen D. Henkin has children regularly registered in and attending the elementary or secondary grades in the public schools of New York. The appellants allege that the expenditures in question, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were for furnishing instructional materials for use in

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such purposes as will insure the preparation of children and youth for effective citizenship in our democracy.

The League recognizes the moral and spiritual values of religion in American life, and believes the public school has a responsibility to develop moral and spiritual values. The League believes that the American tradition of separation of church and state must be preserved inviolate and should be most vigorously and zealously safeguarded. The League grants the right of special interest groups, including various religious sects, to maintain their own schools so long as such schools meet the standards defined by the states in which they are located. The League believes that these separate or non-public schools should be financed entirely by their supporters and is therefore unalterably opposed to proposals to devote public funds either to the direct or to the indirect support of such schools.

The League favors the generous financial support of the public schools by local, state, and federal funds. It believes, however, that federal grants should be so made that there will be no federal control or interference in the administration, curriculum, personnel, and instructional procedures of local school systems.

The League seeks the active support of those educators and laymen who are committed to the ideals of Horace Mann and who believe in the aims and policies set forth in this platform."

religious and sectarian schools, to the detriment of programs of public education in the City of New York. These expenditures and the law upon which they are based, the appellants contend violate the First Amendment to the United States Constitution in that they constitute an establishment of religion and further, "in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes" in derogation of the plaintiffs' conscientious objections. Complaint paragraphs 16, 17.

The three judge District Court below granted the appellees' motion to dismiss solely on the ground that, by reason of this Court's decision in *Frothingham v. Mellon*, 262 U.S. 447, the appellants had no standing to bring the action, therefore there was thus no justiciable controversy and the court lacked jurisdiction over the subject matter. From this final order, direct appeal was taken to this Court.

SUMMARY OF ARGUMENT

The judges in the majority below ruled that it follows from the 1923 decision of this Court in *Frothingham v. Mellon*, 262 U.S. 447, that the instant suit must be dismissed because the appellants lack the requisite standing to sue.

These *amici curiae* support the appellants' contentions that this suit presents a case or controversy, involving issues appropriate for judicial resolution, which the appellants have standing to bring.

I.

Frothingham v. Mellon was a case involving a suit brought by a single federal taxpayer, solely in her capacity as a taxpayer, to enjoin certain appropriations of federal

funds, solely on the grounds that (a) the power to make the appropriations in question was never conferred by the Constitution on the federal government, 262 U.S. at 477 (extract from argument) and (b) the appropriations invaded the reserved powers and sovereignty of the states. The instant case differs from *Frothingham* in at least three essential respects. First, most of the potential inconveniences to the federal government and courts, which the ruling in *Frothingham* was designed to protect against, are now eliminated by the Federal Rules of Civil Procedure, which provide for class actions and other joinder devices, thereby protecting the federal courts and the government's spending programs against a multiplicity of taxpayers' suits. Other procedural developments since *Frothingham* afford similar protection to this Court. Second, unlike the situation in *Frothingham* and virtually every case to which its doctrine was subsequently applied, the interest of these appellants is more than the economic interest of taxpayers in their tax bills; the interest here involves a claim of preferred, personal, First Amendment rights fundamental to the nature of the democratic order. Third, unlike the situation in *Frothingham*, the instant case does not involve considerations of federalism; and to the extent that *Frothingham* was bottomed on the political question doctrine, subsequent decisions have undercut its authority. In short, this case presents a justiciable and not a political question.

II.

The trend of authority since *Frothingham* has been to relax the rigidity of standing requirements and to entertain jurisdiction in cases previously thought to be beyond judicial competence. The recent authorities, in fact, favor standing in the instant case, involving as it does a claim under the Establishment Clause. See *Everson v. Board of Education*, 330 U.S. 1; *Engel v. Vitale*, 370 U.S. 421; *Abing-*

ton School District v. Schempp, 374 U.S. 203; *Horace Mann League v. Board of Public Works,* 242 Md. 645, 220 A. 2d 51 (1966), *cert. denied, app. dismissed,* 385 U.S. 97. Each of these cases involved state and local expenditures claimed to be in derogation of the Establishment Clause. Each of the claims was heard. As Professor Jaffe has pointed out, it would be a "crowning paradox" if the constitutionality, under the Establishment Clause, of state and local, but not federal, expenditures can be adjudicated by the Supreme Court at the instance of a taxpayer-citizen, since (1) the expenditure in each instance is claimed to violate the First Amendment, which, historically and textually, was a restraint on the federal government and not the states; (2) the interest of a federal taxpayer is generally quantitatively as great as that of a state taxpayer, if not substantially greater; and (3) the entire concept of a taxpayer's suit, at the local as well as the national level, is "a fiction."

Fortunately, this Court need not announce any such paradox as law. The recent Establishment Clause cases involving state practices, particularly *Engel* and *Abington,* make it crystal clear that *Frothingham's* restrictions do not apply more broadly than to fiscal claims of taxpayers whose only personal interest is in the size of their tax bills. In *Abington,* standing was found to exist where the plaintiffs were parents of school children attending schools where prayers were said, and therefore the state's resources were expended in direct support of religion. The absence of coercion was expressly held to be immaterial. Standing was defined to include persons whose sensibilities were directly affected, and without regard to their actual financial interest. As *Doremus v. Board of Education,* 342 U.S. 429, establishes, these standards for determining standing are equally applicable to suits by federal and state taxpayer-citizens.

III.

Reason and sound public policy favor the exercise of jurisdiction in this case which arises under the First Amendment. As the satisfactory experience of the states that entertain taxpayers' suits indicates, such jurisdiction here would open no Pandora's box. All the purposes of standing are met in this case. The instant case obviously has the necessary measure of "concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204. This is no feigned suit. This is no suit presenting a hypothetical question of law in an abstract context. It raises no political question. The appellants' interests are real, personal, and deeply felt. These appellants are as appropriate as any to present the First Amendment interests which are at stake in this case; the important issues presented by this case will never be readier for resolution; and indeed delay will be positively harmful. Finally, exercise of jurisdiction in this case is consistent with our society's legitimate expectations and this Court's increased recognition that access to the courts is an essential political activity or right.

ARGUMENT

THIS SUIT PRESENTS A CASE OR CONTROVERSY INVOLVING ISSUES APPROPRIATE FOR JUDICIAL RESOLUTION, WHICH APPELLANTS HAVE STANDING TO BRING.

I. This Case Is Essentially Different From Frothingham v. Mellon, Which Is Therefore Not Controlling.

Frothingham v. Mellon, 262 U.S. 447, was a suit brought by a single federal taxpayer, solely in her capacity as a taxpayer, to enjoin the appropriation of federal funds from the general treasury for the implementation of the Maternity Act of 1921. Mrs. Frothingham, the taxpayer, contended that the appropriations were "for purposes wholly outside of any authority or power conferred upon the

Government of the United States by the Constitution," 262 U.S. at 477 (extract of the argument for Mrs. Frothingham), more specifically "for purposes not national, but local to the States" in derogation of the powers reserved to the States under the Tenth Amendment and of the sovereignty of the States. 262 U.S. at 479.

Distinguishing the situations of municipal and state taxpayers, 262 U.S. at 486-87, the Court appeared to hold that the plaintiff had no standing, as a federal income taxpayer, to challenge the validity of the appropriations. The Court's opinion reveals that the decision was based upon the interplay of several considerations. First, in view of the limited development of the law of remedies at that time, the Court found the interest of a federal taxpayer "in the moneys of the Treasury — partly realized from taxation and partly from other sources — is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." 262 U.S. at 487.[1]

Second, at a time before this Court was empowered to control its docket by discretionary *certiorari* review, and before the full development of the protective doctrine of the class action, the Court was concerned with problems of administrative and judicial convenience, for it feared that:

> "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review

[1] As to the crucial effect of the undeveloped state of the law of remedies on *Frothingham*, see, *e.g.*, *Judicial Review*, (Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary on S. 2097, U.S. Sen., 89th Cong., 2d Sess., March, 1966) (henceforth cited as *Judicial Review*), Vol. 1, pp. 5, 16, and *passim*; Symposium, 12 Buffalo L. Rev. 35 (1962).

> but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." 262 U.S. at 487.

Third, the Court was concerned with the maintenance of the separation of powers, and was reluctant to decide a "political" question; the Court would not "assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." 262 U.S. 489. See *Massachusetts v. Mellon*, the companion original suit brought by Massachusetts against the Maternity Act appropriations, in which the Court said:

> ". . . [T]he naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent . . . : [raises a question that] is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power." 262 U.S. at 483.

But cf., e.g., United States v. Butler, 297 U.S. 1; *Steward Machine Co. v. Davis*, 301 U.S. 548; *Helvering v. Davis*, 301 U.S. 619 (all entertaining essentially the kind of attacks rejected in *Mellon*).

A. *The instant case is different from Frothingham in that most of the inconveniences to the governments' spending programs and to the federal courts which Frothingham sought to protect against are now avoided by the Federal Rules of Civil Procedure and the Judges Act of 1925.*

Frothingham was a suit by a single taxpayer, solely as taxpayer. It was not a class action, and the present refine-

ments of the class action to preclude vexatious individual suits had not yet occurred. If the Court had entertained Mrs. Frothingham's action, there was reason to fear that the doors might have been opened to separate individual suits by innumerable taxpayers; for at that time there was no well-developed protection like F.R.C.P. 23, which assures that the result in any one suit will foreclose the prosecution of new actions on the same point by others.

There is now no danger of flooding the federal courts with large numbers of individual taxpayers' suits, each of which, to the inconvenience of the government and its spending programs, would have to be defended. The summary judgment (F.R.C.P. 56), the joinder procedure (F.R.C.P. 17-25), and above all, the class suit (F.R.C.P. 23), completely eliminate the dangers of judicial inconvenience feared by the *Frothingham* Court. The instant case is not like *Frothingham*, a suit by a single taxpayer, but a class suit brought "by the plaintiffs, on their own behalf and on behalf of all others similarly situated," who share the conscientious views and scruples of the plaintiffs. (Complaint, paragraph 1).

Under the 1966 amendments to Federal Rules of Civil Procedure 23, governing class actions, there has been a merger of the formerly different kinds of class action, "true," "hybrid," and "spurious," with the express purpose of assuring that "all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class." Moore's Federal Practice Rules Pamphlet 544 (Moore & Fink, Eds. 1966, setting forth the Advisory Committee's comments). Thus, unlike at the time of *Frothingham*, the federal courts, and the governments' spending programs as well, now are pro-

tected by the doctrines of *res judicata* and collateral estoppel, as well as *stare decisis*, from repetitive suits.

One of this Court's latest rulings on standing, set forth in *Swann v. Adams*, 385 U.S. 440, 443, a recent reapportionment decision, indicates the still continuing erosion of the *Frothingham* approach to standing, in cases raising significant civil liberties claims, by the progressive development of the class action as a device for protecting the courts. Justice White, speaking for a unanimous Court on the standing point, said:

> "The State would have us dismiss this case for lack of standing on the part of appellants to maintain this appeal because *appellants are from Dade County, Florida, which appellants concede has received constitutional treatment under the legislative plan.* Appellants, however, had before the District Court their own plan which would have accorded different treatment to Dade County in some respects as compared with the legislative plan, and the alternative plan was rejected by the District Court. *Moreover, the District Court has apparently consistently denied intervention to other plaintiffs, seemingly treating the appellants as representing other citizens in the State.* The challenge to standing cannot succeed." (Emphasis supplied.)[2]

Finally, since the Judges' Act of 1925, the Supreme Court's *certiorari* jurisdiction is the great protection of

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[2] See also the Appendix to this brief at p. A1, wherein is reproduced the August 1, 1967 order of a statutory three judge federal district court, in the District of Maryland, denying without prejudice the government's Motion to dismiss based on *Frothingham* in *Seversmith v. Machiz*. The interests of the plaintiffs in *Seversmith* are the same as those of the appellants now before this Court. *Seversmith* involves a challenge, on First Amendment grounds, to Section 511 (a) (2) (A), Internal Revenue Code of 1954, which exempts churches and conventions or associations of churches, from imposition of tax upon their "unrelated business taxable income."

this Court against being flooded by frivolous litigation, and renders *Frothingham* completely inapposite insofar as the decision is based upon any concern for the docket of this Court. When, on the other hand, a non-frivolous challenge is made to a government spending program, a statutory three judge district court ordinarily will be convened, as in the present case. 28 U.S.C. Sections 2282, 2284. The case is then heard by this Court on direct appeal, thereby protecting the government spending program from being tied up during multiple appeals, in the unlikely event that the district court grants an injunction *pendente lite*. Moreover, this Court may protect itself and the federal fiscal program, through summary disposition of cases not raising substantial federal questions.

B. *The interest of the instant appellants is more than the economic interest of taxpayers in the size of their tax bill; it involves a claim of preferred personal First Amendment rights fundamental to the nature of the democratic order.*

In the present case appellants do not resist a tax or ask for restraint of expenditures to save money. They are not concerned solely with the size of their tax bill. Their concern is more one of personal conscience and civic fidelity than of the purse. They seek the redress of a grievance — the use of the machinery of government, and of federal funds in whatever amount to establish sectarian religion. The rights they assert are the right to be free from the onerous and offensive burden of supporting directly or indirectly an establishment of religion and from the abridgement of their own free exercise of religion which results when they are forced to contribute *any* amount to the support of faiths to which they cannot subscribe. For the same reason, this case is different not only from *Mellon*,

but also from all the Supreme Court cases denying standing to challenge federal statutes. *E.g., Alabama Power Co. v. Ickes,* 302 U.S. 464; *Tennessee Elec. Power Co. v. TVA,* 306 U.S. 118; see also, *Abbot Laboratories v. Gardner,* 387 U.S. 136, 153-154. As Professor Kauper has pointed out:

> ". . . the Supreme Court has never had occasion squarely to consider the question whether a Federal taxpayer has standing to challenge Federal spending on the ground that it violates an express prohibition such as the establishment limitation as distinguished from the ground that the general purpose of spending is outside the legislative spending power." *Judicial Review, supra,* Vol. 2, p. 503.

C. *The instant case does not involve considerations of federalism, or the political question of the separation of powers.*

Unlike *Massachusetts v. Mellon,* the instant case involves no state interests. The right asserted here is a personal right of the plaintiffs guaranteed to each of them, in title of their own personal consciences, by the First Amendment, and not merely a general interest in the maintenance of federalism, which is qualitatively the same for all citizens. Moreover, *Baker v. Carr,* 369 U.S. 186 and its progeny have completely destroyed any barrier to standing based on federalism as a "political question," and the Court's disposition in *Steward Machine Co. v. Davis,* 301 U.S. 548, all but removed separation of powers as an obstacle to standing in a federal spending case like the present. See also, *United States v. Butler,* 297 U.S. 1. Finally, applying the recently refined tests for determining whether a complaint raises a "non-justiciable" or "political question" (*Baker v. Carr,* 369 U.S. 186), it is clear that the Establishment Clause decisions of this Court reveal that the First Amendment is an ample repository of judicially manageable standards and that, in all other respects, this case

presents a question apt for judicial determination. See, *e.g., Everson v. Board of Education,* 330 U.S. 1; *McCollum v. Board of Education,* 333 U.S. 203; *Engel v. Vitale,* 370 U.S. 421; *Abington School District v. Schempp,* 374 U.S. 203; see also, *Horace Mann League v. Board of Public Works,* 242 Md. 645, 220 A. 2d 51 (1966), *cert. denied, app. dismissed,* 385 U.S. 97.

II. The Recent Authorities Favor Standing in the Instant Case, Which Involves A Claim Under the Establishment Clause.

The trend of authority since *Frothingham* has been to relax the rigidity of standing requirements and to entertain jurisdiction in cases previously thought to be beyond judicial competence.

First, this Court has made it clear that in Establishment cases, and in other particularly important areas, standing requirements are less substantial than in cases dealing with purely economic interests. As pointed out by Congressman Celler (111 Cong. Rec. 5930, House, March 26, 1965, Daily Ed.) quoted in *Judicial Review, supra,* Vol. 1, pp. 40-41):

> ". . . [I]n recent cases, the Supreme Court has very significantly relaxed what had been believed to be the standards governing standing to sue in controversies over freedom of religion and establishment of religion. Thus in the school prayer cases, the Court reviewed the validity of educational practices at the behest of the parents of children who were affected only in the sense that they might be embarrassed by having to asked to be excused from class during the exercises. There was no pocketbook interest involved, and indeed, there was no legal compulsion requiring the children to be present during the exercises of which their parents sought judicial review.
>
> . . . In my judgment the Court has, in deference to the great importance of the issues involved in this sphere

> of our national life, extended the law of standing to sue to insure that these issues may be resolved in accordance with law and the Constitution."

Even as leading an opponent of the recent Supreme Court decisions as Professor Sutherland concedes (*Establishment According To Engel*, 76 Harv. L. Rev. 25, 39 (1962)) that:

> "The right to be free from unconstitutional taxation, to be sure, has not the same overtones as the right to be free from religious oppression. A court could conceivably dismiss a tax case on the ground that the tax minimally affected the plaintiff's rights, and could still refuse to apply *de minimis* to invasions of religious freedom."

The decisions of the Court bear out Congressman Celler's estimate. In *Everson v. Board of Education*, 330 U.S. 1, the Court accorded standing to New Jersey taxpayers to challenge New Jersey expenditures for bus transportation for parochial school students. *Frothingham* was held to be no bar to the jurisdiction of the Court because *Everson* involved a state taxpayer challenging a state appropriation. The unpersuasiveness of the distinction underscores the blow to *Frothingham* struck in the *Everson* opinion. As pointed out by Professor Jaffe, who cites and approves the views of Professor Davis, it would be a "crowning paradox" if the constitutionality, under the Establishment Clause, of state and local expenditures can be adjudicated by the Supreme Court at the instance of a taxpayer-citizen, but not the constitutionality of federal expenditures since, (1) the expenditure in each instance is claimed to violate the First Amendment, which, historically and textually, was a restraint on the federal government and not the states;[3] (2) the interest of a federal taxpayer is generally

[3] See, Appendix to Jurisdictional Statement, pp. 32-33 (Frankel, J. dissenting below) (henceforth cited Append.)

quantitatively as great as that of a state taxpayer, if not substantially greater,[4] and (3) the entire concept of a taxpayer's suit, at the local as well as the national level is "a fiction." As Professor Jaffe has said:

> "... Even at the local level, the financial impact on the plaintiff is both speculative and minute. ...
>
> Whatever the tax impact, it does not distinguish the plaintiff from the whole body of taxpayers. He sues not because of a peculiar wrong done to him but quite literally qua taxpayer, a characteristic which he shares with an indeterminate number of his fellows."[5]

But the paradox does not exist, for this Court, while relaxing the requirements for standing has also established that the same standards in fact govern federal and state taxpayers' suits. *Doremus v. Board of Education*, 342 U.S. 429, 433-35, denied standing to challenge in the Supreme Court a state Bible reading requirement, where the plaintiff's child had graduated by the time the case reached the Supreme Court. Justices Douglas, Reed and Burton dissented. Graduation of the plaintiff's child eliminated any direct personal issue of plaintiff's conscience as a parent. The only other interest the plaintiff pressed was his interest as a state taxpayer. Significantly, the Court held that a taxpayer's suit as such, whether state or federal, was governed by *Frothingham*. Since the plaintiff had shown

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[4] The Appendix to this Brief, at pp. 2a-3a contains an elaboration of some available statistical data, bearing upon federal and state taxpayers' quantitative interests in 1922 and 1960, that indicates that the factual premise of the *Frothingham* decision in this respect was and is fallacious.

[5] Jaffe, *Standing to secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1266, 1293-94 (1961). See also Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955). Even Professor Sutherland admits the inconsistency and recognizes the negligibility of the "minimal interest" of a state taxpayer, Sutherland, *Establishment According To Engel*, 76 Harv. L. Rev. 25, 45 (1962).

no measurable appropriation or disbursement of school funds which would give him standing under *Everson's* rule that a state taxpayer has the "direct interest" required for taxpayer's suits by *Frothingham*, he was barred from suing. Moreover, in *Doremus* there was no question but that the issue could be pressed conveniently by much more appropriate plaintiffs than were then before the Court; for no parent was before the Court asserting a claim of conscience on behalf of any child immediately subject to the challenged requirement.

Engel v. Vitale, 370 U.S. 421, makes clear that *Doremus* was not intended to restrict standing to challenge First Amendment violations directly affecting an individual plaintiff. The Court pointed out that neither financial interest nor coercion was required as a basis for standing. As Professor Sutherland has observed (*Establishment According To Engel*, 76 Harv. L. Rev. 25, (1962)):

> "... [I]n the *Prayer Case* the Court finds no actionable coercion of children to demonstrate dissent; the majority opinion adopts, instead, a quite different formula — that a classroom exercise, if once found to be an 'establishment of religion,' becomes enjoinable under the fourteenth amendment, even if no schoolchild is subject to 'coercion,' and even if no plaintiff demonstrates any unconstitutional expenditure of taxpayers' money. One finds asserted in *Engel* no [*Frothingham*] requirement that a litigant, if he would invoke judicial power to forbid governmental action, must show that by it he 'has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' *Engel* thus suggests that the Supreme Court has somewhat revised its previous ideas concerning 'standing in court,' concerning, that is, the type of grievance a litigant must experience before the federal judiciary will intervene to forbid state governmental activity. The

opinions seem to take as premise a judicial function rather more expanded than most lawyers had come to find usual. Here, rather than in the specific issue decided, may turn out to be the ultimate importance of the case." (76 Harv. L. Rev. at 26-7).

"In the *Prayer Case*, the Supreme Court, finding insufficient jurisdictional hardship imposed on the plaintiffs' children, would conventionally have denied certiorari. Absence of proof that the prayer added to school costs had eliminated the only other possible standing, unless *Doremus* was to be disregarded. But the *School Prayer* opinion did not expressly overrule *Doremus*; one wonders if it was overruled in silence. Is there in *Engel* a new doctrine concerning the wrongs against which the fourteenth amendment, judicially enforced, will protect all persons? Where a state does something amounting to 'establishment,' will the Supreme Court enjoin it on the suit of any member of society who dislikes the policy? And is this new doctrine likely to spread beyond religious establishment to other policy judgments?" (76 Harv. L. Rev. at 35)

In *Abington School District v. Schempp*, 374 U.S. 203, the Court made crystal clear that the restrictions of *Frothingham* do not apply more broadly than to fiscal claims of taxpayers whose only personal interests are in the size of their tax bills. Standing was found to exist in *Abington* where the plaintiffs were parents of school children in schools where the religious exercises were held and the state's resources were expended in direct support of religion. The absence of coercion was expressly held to be immaterial. Standing was broadly defined to include persons whose sensibilities were directly affected by reason of their close connection with the problem, without regard to whether they were taxpayers or not. A taxpayer's suit was clearly established to be not the only footing on which standing could rest. The door closed to plaintiff as a mere taxpayer might be open to him because

he is as well a citizen and parent asserting a claim of conscience under the First Amendment.[6] And, as *Doremus v. Board of Education*, 342 U.S. 429, establishes, these standards for determining standing are equally applicable to suits by federal and state taxpayer-citizens.

Even apart from the First Amendment cases, there has been an inexorable erosion of the *Frothingham* attitude manifested in the authorities. See, *e.g.*, *Office of Communication of United Church of Christ v. F.C.C.*, 359 F. 2d 994 (D.C. Cir., 1966) (member of viewing public has standing to challenge F.C.C. order); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1282 (1961); Singer, *Church of Christ: Standing and the Evidentiary Hearing*, 55 Geo. L. J. 264 (1966). In the development of substantive (especially tort) as well as procedural law, the courts are more and more protecting interests which had been regarded in the more hardboiled and less sensitive past as too tenuous to be worthy of judicial protection. *Cf. Baker v. Carr*, 369 U.S. 186.

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[6] "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. *McGowan v. Maryland, supra,* [366 U.S. 420] at 429-430. The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. See *Engel v. Vitale, supra. Cf. McCollum v. Board of Education,* [333 U.S. 203] *supra; Everson v. Board of Education, supra.* Compare *Doremus v. Board of Education,* 342 U.S. 429 (1952), which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers." *Abington School District v. Schempp, supra,* 374 U.S. at 224, n. 9. See also 374 U.S. at 266-67, n. 30 (Brennan, J., concurring); 374 U.S. at 227-29 (Douglas, J., concurring).

The judicial review legislation which has been on the agenda of Congress in one form or another in recent years does not impair the effect of the foregoing authorities. The bill springs from abundance of caution, and not from Congressional conviction that the law now precludes review. As Congressman Celler urged in opposition to such a bill:

> ". . . I think it is evident that there will be judicial review available as to each and every significant church-state issue that arises under this bill, regardless of whether an explicit provision for such review is made in addition to those already present in the bill." 111 Cong. Rec. p. 5929 (House, March 26, 1965, Daily Ed.); *Judicial Review, supra,* Vol. 2, at p. 41.

Father Drinan, the Dean of the Boston College Law School, reviewing the proposals for legislation, concluded in his article, *Standing to Sue in Establishment Cases,* 1965 RELIGION AND THE PUBLIC ORDER (Giannella Ed.) 161, 183:

> "Whatever conclusions can be drawn from the decisional law of the Supreme Court can perhaps be summed up as follows.
>
> "(1) The Supreme Court from *Everson* to *Schempp* has been generous and non-technical in recognizing the standing to sue of plaintiffs in establishment cases. Barring a sharp reversal of the Court's outlook on the establishment clause, it would appear certain that the Court will continue to follow a policy of liberally extending standing to sue to complainants whose sole grievance is an asserted violation of the establishment clause."

See also, *Judicial Review, supra,* Vol. 2 at p. 505, Statement of Professor Paul G. Kauper, who concludes that "it is possible that the Court at present, even without the aid of a statute, might hold that *Frothingham* does not apply to bar a suit by a Federal taxpayer to challenge Federal spending on the ground it violates the establishment

clause." It may even hold that *"Frothingham* was incorrectly decided and that the Court even without Congressional intervention may reconsider the rule laid down in that case. (See in this connection the separate opinion by Mr. Justice Douglas in *Public Affairs Associates v. Rickover,* 369 U.S. 111, 114.)"

III. Reason and Sound Public Policy Favor the Exercise of Jurisdiction in This "Case or Controversy" Which Arises under the First Amendment and Is In All Respects Apt For Judicial Resolution.

Apart from the procedural developments discussed earlier in this brief, the expense of litigation and the satisfactory experience with taxpayers' suits, as in effect "public actions," in the state courts assure that entertaining jurisdiction here would open no Pandora's box. See Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 Harv. L. Rev. 1265 (1961); Note, *Taxpayers' Suits: A Survey and Summary,* 69 Yale L. J. 895 (1960). Moreover, entertaining jurisdiction over this case will not relax, in any respect, the constitutional requirements of "case or controversy" or any other limitations on the jurisdiction of federal courts.

The nature and purpose of standing have been authoritatively set forth by Justice Brennan speaking for the Court in *Baker v. Carr,* 369 U.S. 186, 204:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."

In applying this test, the Court in *Baker v. Carr* held that plaintiffs had standing as representatives of important

general interests despite the fact that the interest of each of them as an individual voter was *de minimis*. As representatives of the class, the plaintiffs were permitted to press the aggregate interests which it is unlikely any of them could have pressed solely as an individual.

Justice Brennan elaborated on "the gist of the question of standing" in his full discussion of standing in the establishment clause context in *Abington School District v. Schempp*, 374 U.S. 203, 267 n. 30:

> "Finally, the concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . .' *Baker v. Carr*, 369 U.S. 186, 204."[7]

The instant case obviously has the necessary measure of "concrete adverseness which sharpens the presentation

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[7] Judge Frankel's application of Justice Brennan's standing concept to this case bears repeating here:

> ". . . [W]hen we deal with the subject of First Amendment freedoms, it is essential to start by recognizing (as Mr. Justice Brennan did in the passage quoted above) that it has fallen to the courts in our system to perform 'the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century. * * *' *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943). In discharging this responsibility in cases under the First Amendment, the highest Court has observed more than once that effective enforcement of the 'delicate and vulnerable, as well as supremely precious' rights at stake (*N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)) may require exceptions 'to the usual rules governing standing. * * *' *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); see also, *United States v. Raines*, 362 U.S. 17, 22 (1960); *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965)." Append. p. 34 (Frankel, J. dissenting).

of issues." This is no feigned suit. This is no suit presenting a hypothetical question of law in an abstract context. It raises no political question. The plaintiffs' interests are real, personal, and deeply felt. Unlike the plaintiffs in *Doremus v. Board of Education*, 342 U.S. 429, these plaintiffs are as appropriate as any to present the First Amendment interests which are at stake in this case. Note, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L. J. 895, 924 n. 164 (1960). *Cf. Pierce v. Society of Sisters*, 268 U.S. 510; *Barrows v. Jackson*, 346 U.S. 249; *Poe v. Ullman*, 367 U.S. 497, 509 (Brennan, J., Concurring); *Tileston v. Ullman*, 318 U.S. 44; Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 (1962).[8] In addition this Court has effectively used the *amicus curiae* device to eliminate the slightest possibility of failure to provide full adversary illumination.

Exercise of jurisdiction in this case is consistent with our society's legitimate expectations and this Court's increased recognition that access to the courts is an essential political activity or right. See *N.A.A.C.P. v. Button*, 371 U.S. 415,

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[8] As Judge Frankel said in dissent below:

"One such exception [to the usual rules governing standing], highly pertinent here, is the idea that where asserted violations of the First Amendment are in issue, a particular plaintiff or class of plaintiffs may be found to have standing because to deny it 'might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment — even though no special monetary injury could be shown.' *Abington School District v. Schempp, supra*, 374 U.S. at 266, n. 30 (Brennan J., concurring); see also, *Bantom Books, Inc. v. Sullivan, supra*, 372 U.S. [58] at 64-65, n. 6; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)." Append. pp. 34-35 (Frankel, J., dissenting).

There has never been any suggestion in this case, nor could there be, that substantial First Amendment questions are not involved. See, *e.g., Abington School District v. Schempp*, 374 U.S. 203; *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A. 2d 51 (1966), *cert. denied, app. dismissed*, 385 U.S. 97

430-31; *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1. It is submitted that Professor Jaffe is correct in his view that:

> "The country, I think, will *want* the Court to settle issues of this kind — issues which, though they do not touch the individual as immediately as would a slap on the back, in some way not easy to define are intimately related to the individual's situation and to his ethos." (74 Harv. L. Rev. at 1312).

As Senator Morse has pointed out:

> ". . . in my judgment, we are moving into an era of our society in which I think the American people are entitled to know for a certainty that the course of action that their legislature is taking is constitutional. I think that to the maximum extent possible, without doing great damage to the judicial process from the procedural standpoint in order to carry out its major work, we ought to evolve procedures that leave no question or doubt that if there is a good faith constitutional issue raised, it will be settled by the courts." (*Judicial Review, supra*, Vol. 1, p. 441).

Cf. Steward Machine Co. v. Davis, 301 U.S. 548, where the Court in effect relaxed the *Frothingham* limitation on federal taxpayers' standing in order to affirm the constitutionality of the federal unemployment insurance program.

Finally, it is essential that the important substantive issues raised by the complaint in this case be resolved now. Not only will they never be readier for resolution, but delay in resolving them will cause great harm. American education is at the crossroads. Effective direction is hampered by constitutional uncertainties; and if the path of support from public funds for programs of religious schools is unconstitutional, the verdict should be known now before proscribed practices become so entrenched that necessary adjustments become needlessly difficult. An authoritative

answer from this Court is a *sine qua non* for the solution of one of the most vital national problems of this age — In what kind of school system will Americans be educated in the years ahead?

CONCLUSION

The recent decisions of this Court make it evident that this suit is not barred by the rule of *Frothingham v. Mellon*, 262 U.S. 447; and further, that the appellants, possessing the requisite interest or "standing to sue," have presented a "case or controversy," arising under the Establishment Clause of the First Amendment, which in all respects is apt for judicial determination. Consequently, these *amici curiae* urge that the decision of the court below, dismissing the complaint for lack of jurisdiction, be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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